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Supreme Court, U.S.
FILED
AUG 26 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 293

WILLIAM E. COOPER,

Petitioner,

vs.

DEWITT SINCLAIR, AS CUSTODIAN OF THE LAKELAND CITY JAIL,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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DEWITT SINCLAIR, AS CUSTODIAN OF THE LAKELAND CITY JAIL,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

William E. Cooper, the petitioner herein, prays that a writ of certiorari be issued to review the judgment and order of the Supreme Court of the State of Florida affirming the judgment and order of the Circuit Court, Tenth Judicial Circuit, in and for Polk County, Florida, said judgment "denying" a petition for writ of habeas corpus upon the return of the respondent to the writ of habeas corpus theretofore issued by the said circuit court, and which judgment and order remanded the petitioner unto

the custody of the respondent, Dewitt Sinclair, as custodian of the Lakeland City Jail.

Statement of Matter Involved

This cause appears to be a test of whether the prohibitions of the Fourteenth Amendment to the United States Constitution, providing that a person may not be deprived of his life, liberty, or property without due process of law or just compensation, may be circumvented by a municipal ordinance enacted under the style of a police regulation, whereby the municipality prohibits a legitimate use of property upon the *ipse dixit* of the municipal corporation that such use is violative of the health, welfare and morals, and where, as a matter of common knowledge, such use of property is neither inherently nor *per se* violative of either the health, welfare or morals.

The City of Lakeland, Florida, a municipal corporation, enacted an ordinance which provides a criminal punishment for anyone found guilty of keeping, in any manner whatever, an unenclosed house trailer upon his private property within the corporate limits of the said municipality (R. 4, 5). The ordinance drawn in question is not directed at regulating the manner or circumstances surrounding the keeping of such trailer upon such property, but rather it does prohibit and forbid the same regardless of the surrounding circumstances and under penalty of fine or imprisonment, or both. The ordinance endeavors to show upon its face that it was enacted under the police power.

This ordinance (R. 4, 5) upon its face precludes, as a defense, any opportunity, or "day in court", to show that such trailer parked contrary to the ordinance is not, in fact, violative of the health, welfare and morals, or either of them.

The petitioner, owning property within the corporate limits, and further, owning a house trailer, located the same upon such property (R. 22). The petitioner was thereupon arrested, tried and convicted upon a general judgment [verdict] of having violated the ordinance (No. 815; Chapter 35, Section 27 of the Code of the City of Lakeland) (R. 1; admitted, R. 3). Trial and conviction being had for "unlawfully parking a trailer car within the City of Lakeland in violation of the ordinance" (R. 20).

As a result of the trial the petitioner was adjudged guilty and thereupon sentenced to a certain fine or in lieu thereof to a specified term in the city prison. Pursuant thereto, the petitioner was delivered to the keeper of the said institution, the respondent (R. 1; admitted, R. 3).

Immediately thereafter the petitioner filed a petition for writ of habeas corpus (R. 1-2); and the writ issued (R. 2). In the petition for writ of habeas corpus, the petitioner set up that the ordinance upon which he was arrested, tried and convicted, is unconstitutional in that the ordinance is violative of the constitutional provisions of both the Constitution of the State of Florida and of the United States; more specifically, that it violates the due process of law clause, and that it does deprive the petitioner of the reasonable use and enjoyment of his own property without due process of law or just compensation, together with being an unreasonable exercise of the police power to the extent of being unconstitutional (R. 1-2).

With the return of the respondent, upon argument of counsel directed to the face of the ordinance, and without evidence having been taken, the Circuit Court, Tenth Judicial Circuit, in and for Polk County, Florida, entered an order in which it "denied" the petition for writ of habeas corpus and remanded the petitioner to the custody of the respondent (R. 6). From that order and judgment,

the petitioner took and duly prosecuted an appeal to the Supreme Court of the State of Florida (R. 7-31).

The court, on rehearing granted, in the appeal, said:

> "It is settled in this jurisdiction that a person held in custody under a sentence of a municipal court upon a conviction on a charge based upon an ordinance alleged to be void, may test the validity of *the ordinance* in a habeas corpus proceeding. [citations]" (R. 26) (Emphasis ours)

It is undisputed that the petitioner brought a proper proceeding to test the validity of the ordinance alleged by him to be void.

The Supreme Court of Florida held that the ordinance applied equally to house trailers located on private property and used for living and sleeping purposes and to those merely parked or stored upon such property, and unoccupied (R. 29). And, that the ordinance was enacted in the exercise of the police power derived of the State by the municipality (R. 30).

There was no showing that the petitioner was convicted upon any particular part of the ordinance; on the contrary, the record clearly shows that the petitioner was convicted of only violating the ordinance, a general verdict and judgment (R. 1; admitted, R. 3). He was not tried or convicted for parking "and living" in the house trailer, but for "unlawfully parking" his house trailer "within the City of Lakeland in violation of the ordinance" (R. 20).

However, the Supreme Court of Florida refused to pass upon the validity of the entire ordinance, but proceeded to pass solely upon the validity of that part of the ordinance which refers to a trailer used for "living" purposes; but casting serious doubt upon the validity of the undecided part of the ordinance (R. 29).

The ordinance contains no saving clause (stating that if one part be held unconstitutional, the remainder is to be and remain in effect); nor was the ordinance held to be readily severable in its provisions; and, there is no evidence in the record to show that delineation has been made in its provisions.

The court held, however, if in the instant case the validity of the ordinance with regard to "living" in a parked trailer could be upheld, the ordinance would stand, and the petitioner would rightly have been remanded to the custody of the respondent (R. 29).

The petitioner urged that the terms of the ordinance which makes the parking of a house trailer unlawful as *per se* violative of the health, welfare and morals, preclude the petitioner his "day in court" to show that in fact his trailer is not violative of such (R. 18); hence, the petitioner is deprived of his property [the free use and enjoyment thereof] without due process of law. The court said nothing with regard thereto, but by upholding the ordinance, the determination is that the city commission could declare, and conclusively, that house trailers parked on private property within the city limits are *per se* violative of the health, welfare and morals, and under the police power to regulate could absolutely prohibit the same.

Finally, the court said, in summarizing:

> "Appellant has failed to show that the ordinance here in question is not better calculated to promote the health and general welfare of the citizens of Lakeland, * * * than would be the case were indiscriminate parking and use of trailers permitted throughout the city." (R. 31)

Thus and thereby, the Supreme Court of Florida, has reduced the federal question presented by the petitioner (that is, whether the ordinance drawn in question in-

fringes upon the Fourteenth Amendment by depriving the petitioner of his property without due process of law or just compensation, and whether the ordinance is a reasonable exercise of the police power), to: whether the absence of the ordinance would be more reasonable than its presence, and whether such was proved by the petitioner. The query of the court said nothing whatever upon the question of whether the terms of the ordinance meet "due process of law".

The judgment and order of the lower court was affirmed; the validity of the ordinance upheld; and the petitioner a fortiori remanded to the custody of the respondent (R. 31).

Jurisdiction

1. Jurisdiction of this Court is invoked under Title 28, United States Code, section 1257, which provides, in part:

> "Final judgments or decree rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, * * *."

2. The following cases are believed to sustain the jurisdiction of this Court:

> "Where it appears from the opinion of the State court of last resort [R. 25-31] that a state statute [ordinance herein] was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction * * *." See:

Charleston Federal Savings & Loan Assn., etc. v. *Alderson*, 324 US 182, 65 S Ct 624, 89 L ed 857.

Municipal ordinances constitute state action and are subject to the prohibitions of the Fourteenth Amendment. See:

Carlson v. *People of State of California,* 310 US 106, 60 S Ct 746, 84 L ed 1104; rehearing denied, 310 US 657, 60 S Ct 1072, 84 L ed 1420; see also: *Lovell* v. *City of Griffin, Ga.,* 303 US 444, 58 S Ct 666, 82 L ed 949; reversing *Lovell* v. *City of Griffin,* 191 SE 152, 55 Ga. App. 609, conforming 197 SE 347, 57 Ga. App. 901.

See also:

Terminiello v. *Chicago,* 337 US 1, 69 S Ct 894, 93 L ed 1131, rehearing denied 337 US 934, 69 S Ct 1490, 93 L ed 1740; *Chicago, Burlington & Quincy RR Co.* v. *City of Chicago,* 166 US 234, 17 S Ct 581, 41 L ed 979; *Daly* v. *Elton, Chief of Police,* etc., 195 US 242, 25 S Ct. 22, 49 L ed 177; *Dobbins* v. *Los Angeles,* 195 US 223, 25 S Ct 18, 49 L ed 169; *Yick Wo* v. *Hopkins, Sheriff etc.,* 118 US 356, 6 S Ct 1064, 30 L ed 220.

3. The Supreme Court of the State of Florida is the highest court of the State.

4. The judgment of which review is sought is a final judgment of the Supreme Court of the State of Florida (R. 25-31).

5. The judgment herein sought to be reviewed was filed on the 26th day of June, A. D. 1953 (R. 25); this action being filed within the time provided for obtaining review on certiorari.

6. The federal question of substance which has been presented to the Supreme Court of the State of Florida for decision is:

Where the petitioner parked his house trailer upon his property and is convicted and confined upon a municipal ordinance (enacted under the police power

derived from the State) which provides that all unenclosed house trailers parked upon private property within the municipality are unlawful upon the grounds that such are violative of the health, welfare and morals; and the terms of the ordinance preclude the petitioner of an opportunity, as a defense, to show that his trailer so parked is not violative of the health, welfare and morals; is the ordinance void as repugnant to the Fourteenth Amendment to the United States Constitution by reason of taking the petitioner's private property without "due process of law" or just compensation, and an unreasonable exercise of the police power, so that the detention of the petitioner upon such ordinance is consequently illegal?

In its dictum the Supreme Court of Florida cast serious doubt upon the validity of the ordinance with regard to the part making unlawful the mere parking of such trailer (R. 49); and, although the petitioner was convicted upon a general judgment [verdict] of guilty of violating the ordinance (R. 1; admitted, R. 3), the court *refused* to pass upon the validity of each "part" of the ordinance and if any were invalid, to discharge the petitioner. But rather, upheld one "part" of the ordinance as valid, and therefore upheld the validity of the ordinance and detention of the petitioner; this, *absolutely contrary* to the recent decisions of this Court in: *Terminiello* v. *Chicago* (1948), 337 US 1, 69 S Ct 894, 93 L ed 1131; rehearing denied, 337 US 934, 69 S Ct 1490, 93 L ed 1740; *Stromberg* v. *California* (1931), 283 US 359, 51 S Ct 532, 75 L ed 1117, 73 ALR 1484.

As to the apparent conflict between the "part" of the ordinance upheld by the Supreme Court of Florida and decisions of this Court upon the subject see:

"• • • declaration by the city council • • • that a certain structure was an encroachment or obstruction,

did not make it so, nor could such declaration make it a nuisance unless in fact it had that character."

Yates v. *City of Milwaukee, etc.,* 10 Wall., 77 US 497, 19 L ed 984.

"* * * no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying oppobrious epithets to the prohibited act, * * * *a statute would deny due process which precluded the disproof* in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis."

U. S. A. v. *Carolene Products Co.,* 304 US 144, 58 S Ct 778, 82 L ed 1235 (Emphasis ours).

"The mere restriction of liberty or of property rights cannot of itself be denominated "public welfare" and treated as a legitimate object of the police power; for *such restriction is the very thing that is inhibited by the Amendment* [14th]."

Coppage v. *Kansas,* 236 US 1, 35 S Ct 240, 59 L ed 441, LRA 1915C, 960. (Emphasis ours)

"We need scarcely repeat what this court has more than once said, that the power to regulate * * * cannot be exerted in violation of any fundamental right secured by * * * the Constitution. *Gibbons* v. *Ogden,* 9 Wheat. 1, 196, 6 L. ed. 23, 70; *Lottery Case* (*Champion* v. *Ames*) 188 US 321, 353, 47 L. ed. 492, 500, 23 Sup. Ct. Rep. 321."

Adair v. *U. S.,* 208 US 161, 180, 52 L. ed. 436, 445, 28 S Ct 277.

"A statutory provision which is not a legitimate police regulation cannot be made such * * * by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power.

> 'Its true character cannot be changed by its collocation' * * * 7 How. 458, 12 L. ed. 775."
> *Coppage* v. *Kansas, supra,*

See also:

> *State of Washington ex rel. Seattle Title Trust Co.* v. *Roberge,* 278 U.S. 116, 73 L. Ed. 210, 49 S. Ct. 50; *Lawton* v. *Steele,* 152 U.S. 140, 38 L. Ed. 385, 14 S. Ct. 499; *Buchanan* v. *Warley,* 245 U.S. 60, 62 L. Ed. 149, 38 S. Ct. 16; *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23; *Lovell* v. *City of Griffin, Ga.,* 303 U.S. 444, 82 L. Ed. 949, 58 S. Ct. 666; *Chicago, Burlington & Quincy RR Co.* v. *City of Chicago,* 166 U.S. 234, 41 L. Ed. 979, 17 S. Ct. 581; *Women's Kansas City St. Andrew Soc.* v. *Kansas City, Mo.,* (C.C.A.) 58 F. 2d. 593; *Heylman* v. *District of Columbia,* 27 App. D.C. 563.

7. The federal question was timely raised, being in the initial pleading (R. 1-2), and the decision thereon is controlling upon this cause.

The Supreme Court of Florida in its decision and order, which is herein sought to be reviewed, noted and stated the petitioner's position as being.

> "* * * 'that the ordinance . . . is not reasonable . . . and . . . is in conflict with the Constitution of the State of Florida and the Constitution of the United States, in that the ordinance in its application deprives the owner of a reasonable use and enjoyment of his own property . . . without due process of law or just compensation . . . that the . . . ordinance does attempt to limit the use of property, and in an unconstitutional manner.' " (R. 25-26)

It is clear that the federal question was recognized and perforce passed upon by the court in the decision of this case; further, that the federal question was timely presented

in the court of original jurisdiction, as well as to the appellate court. The latter court, upon rehearing granted, affirmed the judgment and order of the lower court, thereby necessarily finding contrary to the petitioner on the controlling federal question presented, and for the validity of the ordinance.

The Questions Presented

1. Where the petitioner is convicted of violating a certain municipal ordinance [a general verdict and judgment], and he thereafter, in a habeas corpus proceeding, draws the ordinance into question as being violative of the Fourteenth Amendment to the Constitution of the United States because the ordinance deprives the petitioner of his property without due process of law or just compensation, and is not a reasonable exercise of the police power; is the petitioner entitled to a review of the entire ordinance, and then if any part of the same is unconstitutional is he entitled to be discharged?

(The Supreme Court of Florida answered this question in the *negative*, and refused to pass upon a "part" of the ordinance although casting serious doubt upon its validity [R. 28]; the decision of the State court is in utter and irreconcilable conflict with the recent decisions of this Court, which answered this question in the *affirmative*. See: *Terminiello* v. *Chicago*, [1948] 337 US 1, 93 L. ed. 1131, 69 S. Ct. 894, rehearing denied, 337 US 934, 93 L. ed. 1740, 69 S. Ct. 1490; *Stromberg* v. *California*, 283 US 359, 75 L. ed. 1117, 51 S. Ct. 532, 73 ALR 1484.)

2. Where a municipal ordinance purportedly enacted pursuant to the police power derived from the State, regulates the "parking and/or storing" of house trailers, whether they are occupied or not, by prohibiting the same from being parked unenclosed upon any private property

within the corporate limits; does that power to *regulate* include the power to *prohibit?*

(The Supreme Court of Florida, after electing to pass only on the matter of "occupied trailers" [see question 1 above] answered this question in the affirmative. The Supreme Court of the United States, and many other courts, since the question first arose *held:* the power to regulate *does not* include the power to prohibit. *Gibbons* v. *Ogden,* 22 US (9 Wheat.) 1, 6 L. ed. 23; *In re McCoy,* 101 P. 419, 10 Cal. App. 116; *Madden* v. *State,* 75 P. 1023, 68 Kan. 658; *Chicago Motor Coach Co.* v. *City of Chicago,* 169 NE 22, 25, 337 Ill. 200, 68 ALR 834; *Johnson* v. *Town of Philadelphia,* 47 So 526, 94 Miss. 34, 19 LRA, NS, 637, 19 Ann. Cas. 103; *Peace* v. *McAdoo,* 96 NYS 1039, 1041, 110 App. Div. 13, citing: *Anderson* v. *City of Wellington,* 19 P. 719, 40 Kan. 173, 2 LRA 110, 10 Am. St. Rep. 175; Ex parte Patterson, 58 SW 1013, 42 Tex. Cr. R. 256, 51 LRA 654; *McConvil* v. *Jersey City,* 39 NJ Law. 44; *Thousand Islands Park A'ssn.* v. *Tucker,* 65 NE 975, 173 NY 203, 60 LRA 786; *People* v. *Gadway,* 28 NW 101, 61 Mich. 285, 1 Am. St. Rep. 578; *Andrews* v. *State,* 3 Heisk., Tenn., 165, 8 Am. Rep. 8; *Gibbons* v. *Ogden,* 22 US (9 Wheat.) 1, 6 L. ed. 23; *Phelps Inc.* v. *City of Hastings,* 42 NW 2d 303, 152 Neb. 651.

And, further, to regulate necessarily involves the existence of the thing or act to be regulated. *Andrews* v. *State,* 50 Tenn. (3 Heisk.) 165, 180, 8 Am. Rep. 8; *State ex rel. McMonies* v. *McMonies,* 106 NW 454, 455, 75 Neb. 443, citing Horr. & B. Mun. Ord., sec. 30; *State* v. *Mott,* 61 Md. 297, 48 Am. Rep. 105; *Gordon* v. *City of Indianapolis,* 183 NE 124, 125, 204 Ind. 79; *City of St. Louis* v. *Atlantic Quarry & Const. Co.,* 148 SW 948, 950, 244 Mo. 479; *Peace* v. *McAdoo,* 96 NYS 1039, 1041, 110 App. Div. 13.)

3. May an ordinance declare a certain legitimate use of property violative of the health, welfare and morals and criminally punish such use where, as a matter of common

knowledge, such use is not either inherently or per se violative thereof; and further may such ordinance preclude the opportunity to show that such use of property is not violative of the health, welfare or morals, this without infringing upon the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

(The Supreme Court of Florida, apparently, in upholding the order of the Circuit Court, answered this question in the *affirmative*. This Court, in the reasoning it applied in similar instances answer the same in the negative, see: *U.S.A.* v. *Carolene Products Company*, 304 U.S. 144, 82 L. Ed. 1235, 58 S. Ct. 778; where this Court said:

> "* * * *a statute would deny due process which precluded the disproof* in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis." (Emphasis ours)

and see: *Coppage* v. *Kansas*, 236 U.S. 1, 59 L. Ed. 441, 35 S. Ct. 240; where this Court said:

> "The mere restriction of liberty of property rights cannot of itself be denominated "public welfare" and treated as a legitimate object of the police power; for *such restriction is the very thing that is inhibited by the Amendment* [14th]. (Emphasis ours)

and see: *Buchanan* v. *Warley*, 245 U.S. 60, 62 L. Ed. 149, 38 S. Ct. 16; where this Court said:

> "But, in view of the rights secured by the 14th Amendment to the Federal Constitution, * * * legislation must have its limitations, and cannot be sustained where the exercise of the authority exceeds the restraints of the Constitution.")

Reasons Relied On For the Allowance of the Writ

The Supreme Court of the State of Florida has decided an important question arising under the Fourteenth Amendment to the Constitution of the United States, involving the right of a property owner to peacefully enjoy his property, and not be deprived thereof without due process of law or just compensation by a municipal ordinance enacted under the guise of a police regulation. And, further, the right of such property owner to have a full review of the purported police measure when he is convicted thereof by a general judgment. The decision was made in a way utterly untenable and in conflict with the applicable portions of the decisions of this Court in the following cases:

Terminiello v. *Chicago*, 337 U.S. 1, 93 L. Ed. 1131, 69 S. Ct. 894, rehearing denied 337 U.S. 934, 93 L. Ed. 1740, 69 S. Ct. 1490; *Stromberg* v. *California*, 283 U.S. 359, 75 L. Ed. 1117, 51 S. Ct. 532, 73 A.L.R. 1484. (As to the scope of the review)

State of Washington ex rel. Seattle Title Trust Co. v. *Roberge*, 278 U.S. 116, 73 L. Ed. 210, 49 S. Ct. 50; *Lawton* v. *Steele*, 152 U.S. 140, 38 L. Ed. 385, 14 S. Ct. 499; *Buchanan* v. *Warley*, 245 U.S. 60, 62 L. Ed. 149, 38 S. Ct. 16; *Chicago, Burlington & Quincy RR Co.* v. *City of Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581; *Lovell* v. *City of Griffin, Ga.*, 303 U.S. 444, 82 L. Ed. 949, 58 S. Ct. 666; *Dobbins* v. *Los Angeles*, 195 US. 223, 49 L. Ed. 169, 25 S. Ct. 18; *Daly* v. *Elton, Chief of Police etc.*, 195 U.S. 242, 49 L. Ed. 177, 25 S. Ct. 22; *Yick Wo* v. *Hopkins, Sheriff etc.*, 118 U.S. 356, 30 L. Ed. 220, 6 S. Ct. 1064; other Federal citations, see: *Women's Kansas City St. Andrew Soc.* v. *Kansas City, Mo.*, (C.C.A.) 58 F. 2d 593 [and cases cited therein]; *Heylman* v. *District of Columbia*, 27 App. D.C. 563. (As to validity of the ordinance).

The Supreme Court of Florida has, by upholding the detention of the petitioner, permitted an ordinance purport-

ing to be a police regulation, and which by its terms precludes the petitioner of an opportunity to show that in fact the police regulation has no rational basis, to stand; although the same is apparently repugnant to the inhibitions of the Fourteenth Amendment. Thus and thereby, the court has made precedent which, if it is allowed to stand, will open a new means for a state (or a municipality deriving police power from the state) to enact measures under the guise of police regulations that are upon their face repugnant to the Fourteenth Amendment of the Constitution of the United States.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

I

Opinion of the Court Below

The opinion of the Supreme Court of the State of Florida is reported as: *Cooper* v. *Sinclair,* as Custodian, etc., (Fla.) 66 So. 2d.

II

Jurisdiction

Jurisdiction is fully covered in the foregoing petition for writ of certiorari, and the statement there made is adopted here by reference.

III

Statement of the Case

A concise statement of the case is set forth in the foregoing petition for writ of certiorari under the heading "Statement of matter involved" and, in the interest of brevity, is adopted here by reference.

IV

Specification of Error

1. That the State Supreme Court erred in refusing to pass upon the entire ordinance upon its face, and by reason of isolating, and upholding, a "part" thereof as not being an infringement upon the Fourteenth Amendment, and thereupon remanding the petitioner to the custody of the respondent.

2. The State Supreme Court erred in the construction it placed upon the test to determine whether the municipal ordinance infringed upon the prohibitions set forth in the Fourteenth Amendment to the Constitution of the United States.

3. The State Supreme Court erred in its holding upon the federal question presented by the petitioner, that is, that the ordinance drawn in question violated the provisions of the Fourteenth Amendment by depriving him of his property without due process of law, or just compensation; and that it was an unreasonable exercise of the police power granted the municipality by the state.

4. The State Supreme Court erred in holding the municipal ordinance drawn in question valid as against the petitioner's contention that the same violated the Fourteenth Amendment to the Constitution of the United States.

5. The State Supreme Court erred in affirming the order of the lower court, remanding the petitioner unto the custody of the respondent.

V

Summary of Argument

1. JURISDICTION. Where the opinion of the State court of last resort reflects that a municipal ordinance was drawn in question, as repugnant to the Constitution of the United States, and the decision of the court was in favor of its valid-

ity, jurisdiction thereafter, to pass upon the validity of the ordinance, rests in the Supreme Court of the United States.

2. Necessity for Review. The Supreme Court of the State of Florida in passing upon the federal question, to-wit, whether a certain municipal ordinance is repugnant to the Fourteenth Amendment to the Constitution of the United States not only laid down a test which is erroneous as being incomplete, and similar to one heretofore rejected by this Court, but also, by virtue of precedent set the scope of review into irreconcilable conflict with the law as announced by this Court.

3. Depriving one of the use of his property in any legitimate manner is as well prohibited by the Fourteenth Amendment as is depriving one of the property itself, when done without due process of law.

4. The police power of a municipality, derived from the state, is subordinate to, and limited by the Fourteenth Amendment to the Constitution of the United States; and if the exercise of the police power is unreasonably in conflict with the Amendment, such exercise is unconstitutional and void.

5. Where the governing body of a municipality declares that the parking or storing of a house trailer within the corporate limits and upon private property, regardless of whether the trailer is occupied or not, is violative of the health, welfare and morals; and thereafter enacts an ordinance which prohibits the same entirely, and precludes an opportunity, as a defense, to show that such trailer is not in fact violative of the health, welfare or morals; such an act and exercise of the police power is unreasonable, arbitrary and capricious, and an infringement upon the prohibitions of the Fourteenth Amendment; and, a fortiori such ordinance is invalid and imprisonment thereupon illegal.

6. The police power to regulate does not include the power to prohibit; hence, a municipal ordinance which purportedly regulates a normally innocent use of property by wholly prohibiting such use is lacking of due process of law, and repugnant to the Fourteenth Amendment.

VI

Argument

The jurisdiction of this Court, to review the cause presented by this petition for writ of certiorari cannot be in question, for to employ the words of this Court:

> "Where it appears from the opinion of the State court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction * * *." *Charleston Federal Savings & Loan Assn., etc* v. *Alderson*, 324 US 182, 65 S. Ct. 624, 89 L. ed. 857.

It clearly appears from the opinion of the State court that the validity of the ordinance was drawn in question as being repugnant to the Constitution of the United States (14th Amendment), for the court in its opinion, on rehearing, said the petitioner's position to be:

> "* * * 'that the ordinance . . . is not reasonable . . . and . . . *is in conflict with* the Constitution of the State of Florida and *the Constitution of the United States*, in that the ordinance in its application deprives the owner of a reasonable use and enjoyment of his own property . . . without due process of law or just compensation . . . that the . . . ordinance does attempt to limit the use of property, and in an unconstitutional manner.' " (R. 25-26) (Emphasis ours)

The Supreme Court of Florida took the aforecited matter from the initial pleading of the petitioner in his habeas corpus action, which was the action the Florida Supreme

Court reviewed. It is that appellate proceeding which this Court is now asked to review. The matter aforesaid, appearing in the initial pleading clearly shows that the federal question was timely raised.

Lastly, in the matter of jurisdiction it ought to be noted that although this review is not of a "state statute", it is of an ordinance purportedly passed pursuant to the police power of the municipality derived from the state (so held by the state court on appeal, see: R. 29). The Supreme Court of the United States has held that such ordinances constitute "state action" and are within the prohibition of the due process clause (14th Amendment), and are reviewable by this Court. See:

> *Carlson* v. *People of the State of California,* 310 US 106, 84 L. ed. 1104, 60 S. Ct. 746, rehearing denied 310 US 657, 84 L. ed. 1420, 60 S. Ct. 1072; see also, *Lovell* v. *City of Griffin, Ga.,* 303 US 444, 82 L. ed. 949, 58 S. Ct. 666.

The necessity for review by this Court in the instant case is equally as clear as the jurisdiction for review. In this cause it is apparent that a redefining of the police power in relation to the Fourteenth Amendment is urgently needed. Further, the state court needs to be corrected in the scope of the review it accorded the petitioner on appeal. Not only did the Supreme Court of Florida fail to follow the rule as laid down by this Court, but also it adhered to that very principle which was rejected, refused and *reversed* by this Court, and in comparatively recent years.

This Court, the Supreme Court of the United States, in the cases of:

> *Terminiello* v. *Chicago* (1948), 337 US 1, 93 L. Ed. 1131, 69 S. Ct. 894, rehearing denied 337 US 934, 93 L. Ed. 1740, 69 S. Ct. 1490; and,
>
> *Stromberg* v. *California* (1931), 283 US 359, 75 L. Ed. 1117, 51 S. Ct. 532, 73 ALR 1484,

laid down the rule that if a person was convicted on a general verdict [judgment], not specifying any particular "part" of the ordinance upon which he was convicted, thereafter in a review of that conviction where the constitutionality of the ordinance was brought in question, the review is to be of the *entire* ordinance, and if any "part" is found to be unconstitutional the suitor is to be discharged; this, because for all the general verdict reflects, he might well have been convicted and imprisoned for the unconstitutional "part" of the act.

The Supreme Court of Florida, in the cause at bar, not only failed to follow the above rule, but also determined the rule to be the absolute reverse. That is to say, in this cause the petitioner having been convicted upon a general judgment of guilty of violating the ordinance (R. 1; admitted, R. 3), the state court said, if a "part" of the ordinance could be found to be constitutional it would be assumed that the petitioner was convicted upon that "part" of the ordinance (R. 29). The dangerous precedent that is thereby promulgated is obvious, for any legislative body may include any obviously unconstitutional act with a valid one and upon a general conviction the aggrieved party could have no adequate review or redress, this although he might be convicted actually upon the unconstitutional provision.

It ought to be noted, that the Supreme Court of Florida did not say that a "part" of the ordinance was unconstitutional; but, having found one "part" valid, the court merely refused or abstained from passing judgment upon the remainder. It did however cast serious doubt upon the "part" it abstained from passing upon (R. 29). Such a limited review, contrary to the law as announced by this Court, together with the precedent that it sets, manifestly requires this Court to review this cause. This Court has reviewed on that very matter heretofore, and the state court has decided a cause directly contra thereto.

This Court said, by way of affirming a state court, that deprivation of property does not require actual physical taking, but occurs when free use and enjoyment is affected.

McInnes v. *McKay,* 141 A. 699, 127 Me. 110, *affirmed* 279 U.S. 820, 73 L. Ed. 975, 49 S. Ct. 544.

And that the right to devote land to any legitimate use is "property" within the due process clause of the Fourteenth Amendment.

State of Washington ex rel. Seattle Title Trust Co. v. *Roberge,* 278 U.S. 116, 73 L. Ed. 210, 49 S. Ct. 50.

It can not seriously be doubted that the parking of petitioner's house trailer upon his property within the corporate limits of Lakeland, Florida, is a "property" within the protection of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The ordinance which is drawn in question by its very pointed language, takes the aforesaid "property" from the petitioner. The property, as the ordinance in its preamble declares, is taken because it violates the health, welfare and morals of the municipality. The ordinance *does not* say that such "property" is taken *if* it violates the health, welfare and morals, and it does not leave that as an issue to be determined, *nor does it accord the petitioner any hearing at all thereon;* but, it makes such finding and declaration conclusive (and such finding was so treated by the state court of last resort, R. 28-29). The "depriving" of the petitioner of such property is complete, having occurred at the time the ordinance was passed; the petitioner is not, nor was he ever, accorded a hearing thereon. The sole issue upon which the petitioner is granted the opportunity of hearing is whether or not he possesses such property so that he may be deprived of the same; that is, whether or not he has parked a trailer upon his private property, and if so, he is thereupon fined or imprisoned for such property. The very terms of the

ordinance makes irrelevant, and thereby *precludes,* evidence in disproof of such "property" injuring either the health, welfare or morals.

This Court, in its reasoning with regard to statutes and their restrictions by the due process clause, said:

> " * * * a statute *would deny due process which precluded the disproof* in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis." *U.S.A.* v. *Carolene Products Company,* 304 U.S. 144, 82 L. Ed. 1235, 65 S. Ct. 624. (Emphasis ours.)

The ordinance herein drawn in question, and which the state court reviewed, is precisely just such a statute which this Court denounced in its reasoning, cited immediately herein above, as amounting to a denial of due process of law, and repugnant to the Constitution. That conclusion is inescapable.

A state court decision which states the matter very appropriately, has this to say:

> "The mere ipse dixit of a legislature or of a municipality exercising delegated legislative authority *is not due process." Inhabitants of York Harbor Village Corp.* v. *Libby,* 140 A. 382, 126 Me. 537. (Emphasis ours.)

It is almost inconceivable how an ordinance could make a "property" unlawful upon the grounds that it violates or injures the health, welfare and morals, and by its terms preclude one the opportunity to show that such "property" is not injurious to the health, welfare or morals, and yet be harmonious to due process of law.

There are many and varied definitions of "due process of law", but one of long standing is the statement thereon by Mr. Webster, made in:

> *Dartmouth College* v. *Woodward,* 4 Wheat., 17 U.S. 518, 4 L. Ed. 629,

that is, due process "hears before it condemns". The case at bar is classic of the converse, the ordinance *condemns* and precludes, by making irrelevant, any *hearing* thereon, either before or after such condemnation.

The Supreme Court of Florida, in its decision said:

> "As has been noted, the return shows that the ordinance was adopted as an integral part of a comprehensive plan for regulating the use of property within the corporate limits of the City of Lakeland and was enacted in the exercise of the police power granted it by the laws of the State of Florida. This must also be taken as a correct statement of its purpose, * * * " (R. 29).

Clearly, the regulation of the use of property is the announced "public welfare" which the municipality is protecting; the object of the exercise of the police power is the regulation, and restriction, of the right to use property.

However, this Court said:

> "The mere restriction of liberty or of property rights cannot of itself be denominated "public welfare" and treated as a legitimate object of the police power; *for such restriction is the very thing that is inhibited by the Amendment* [14th]. *Coppage* v. *Kansas,* 236 U. S. 1, 59 L. Ed. 441, 35 S. Ct. 240. (Emphasis ours.)

and, in the same, further said:

> " * * * a statutory provision which is not a legitimate police regulation cannot be made such * * * by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power. 'Its true character cannot be changed by its collocation' * * * [citing] 7 How. 458, 12 L. Ed. 775."

It is obvious, that the real purpose of the ordinance is to regulate "the use of property" and that it was enacted under the police power. Apparently the state court held

such a legitimate object of the police power, although such holding is in irreconcilable conflict with the opinion of this Court. Consequently, the "ordinance does attempt to limit the use of property, and in an unconstitutional manner", that is, by taking the "property" of the petitioner without due process, but rather by the illegitimate use of the police power. That this was one of the petitioner's specific grounds of attack upon the validity of the ordinance, see: (R. 2), and that it was fully recognized by the state court, see: (R. 26).

Review of this cause is absolutely essential, in order to clearly define the limits of the exercise of the police power; to prevent, by force of case law, a new means of statutory (and ordinance) infringement upon the prohibitions of the Fourteenth Amendment under the guise of police regulations; to protect those rights guaranteed the petitioner under the Constitution; and, to prevent a further continuation of the petitioner's property (and incidentally all the other residents of Lakeland) being taken and deprived him without due process of law. This case has particular significance to the State of Florida, for, as common knowledge dictates, this State is a resort area, and house trailers are common.

The Supreme Court of Florida, at the conclusion of its decision, summarized its holding (R. 31) and said:

> "Appellant [petitioner] has failed to show that the ordinance here in question is not better calculated to promote the health and general welfare * * * than would be the case were indiscriminate parking and use of trailers permitted throughout the city."

A similar "test" proposition was urged by the proponents of an ordinance heretofore reviewed in this Court. In that case the proponents thereof urged that the ordinance was better calculated to preserve the public peace than was its

absence. This Court was quick to interject upon such test proposition by saying:

> "Desirable as that [preventing conflicts] is, * * * this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Buchanan* v. *Warley*, 245 U. S. 60, 62 L. Ed. 149, 38 S. Ct. 16.

Clearly therefore, the "test", as presented in summary by the state court, is erroneous by reason of being incomplete; for the very essence of the test is whether, being reasonable, it denies rights created or protected by the Federal Constitution. For, as said by this Court:

> "To justify the state in * * * interposing its authority in behalf of the public, it must appear, *first*, that the interests of the public generally * * * require such interference; and *second, that the means* are reasonably necessary for the accomplished purpose, *and not unduly oppressive* upon individuals. The legislature *may not, under the guise of protecting the public interests, arbitrarily interfere* * * * or impose unusual and unnecessary restrictions * * *. * * * its determination as to what is a proper exercise of its police power is *not final or conclusive*, but is subject to the supervision of the courts." *Lawton* v. *Steele*, 152 U. S. 140, 38 L. Ed. 385, 14 S. Ct. 499. (Emphasis ours.)
>
> "But, in view of the rights secured by the 14th Amendment to the Federal Constitution, * * * legislation must have its limitations, and cannot be sustained where the exercise of the authority exceeds the restraints of the Constitution." *Buchanan* v. *Warley*, 245 U. S. 60, 62 L. Ed. 149, 38 S. Ct. 16.

And, as said by the Circuit Court of Appeals, Eighth Circuit:

> "The reserved police power of the State must stop when it encroaches on the protection accorded the

citizen by the Federal Constitution. Jacobson v. Massachusetts, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; Thomas Cusack Company v. City of Chicago, et al., 242 U. S. 526, 37 S. Ct. 190, 61 L. Ed. 472, LRA 1918A, 136, Ann. Cas. 1917C, 594; Pennsylvania Coal Company v. Mahon, et al., 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322, 28 ALR 1321; Village of Euclid, et al. v. Ambler Realty Company, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 ALR 1016; Nectow v. City of Cambridge, et al., 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842; Oklahoma City, Okla., et al. v. Dolese, et al. (C. C. A.), 48 F. 2d 734." *Women's Kansas City St. Andrew Soc.* v. *Kansas City, Mo.* (C. C. A.), 58 F. 2d 593.

It would appear, that to hold a property injurious to the general health, welfare and morals would be tantamount to declaring the same a nuisance, a public nuisance. For, the police power need be exercised for the public as distinguished from a class, see: *Lawton* v. *Steele,* 152 U. S. 140, 38 L. Ed. 385, 14 S. Ct. 499. In applying the test of reasonableness of the ordinance here in question, we find:

> The test of the reasonableness of a police regulation prohibiting a nuisance in the use of one's property is that *the prohibited use must be one naturally productive of material discomfort* to persons of ordinary susceptibilities, tastes and habits; and, under ordinary circumstances exceptions cannot be made to meet cases of pronounced idiosyncracies and infirm health. *Heylman* v. *District of Columbia,* 27 App. D. C. 563.

Therefore, unless it can be said that the mere parking of the petitioner's house trailer, unoccupied, upon his property, within the corporate limits of Lakeland, Florida, is naturally productive of some injury to health, welfare and morals, the ordinance must perforce be unreasonable.

Common knowledge dictates that a house trailer, being nothing more than a compact, mobile house, can be no more

injurious to the health, welfare or morals, than a house. And, when the same is unoccupied, even any potential of the house trailer becoming, through use, injurious to the health, welfare or morals is obviated; it is inconceivable how the same might be naturally productive of an injury to the general welfare. Of course, the mere parking of the same might, to some, be an injury to their sensitive aesthetic senses. However, mere aesthetic injury alone is not the public welfare and that has been so often held that citations thereon would serve no useful purpose, being merely superfluous. Aesthetics are not measureable. Then too, it would not be a public welfare benefit, but would accrue solely to the adjoining property owner.

> "Private property cannot, under the guise of police power, be subjected to unreasonable annoyance and arbitrary restriction of its use where *public welfare* can in no way receive benefit by such restriction. Buchanan v. Warley, 245 U. S. 60, 38 S. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201; Louis K. Liggett Company v. Baldridge, Attorney General of Pennsylvania, et al., 278 U. S. 105, 49 S. Ct. 57, 73 L. Ed. 204; Village of Terrace Park, et al. v. Errett (C. C. A.), 12 F. 2d 240; Anderson, et al. v. Jester, et al., 206 Iowa 452, 221 N. W. 354." *Women's Kansas City St. Andrew Soc. v. Kansas City, Mo.* (C. C. A.), 58 F. 2d 593. (Emphasis ours.)

Although the respondent contended (R. 4), and the Supreme Court of Florida held (R. 29), that the ordinance was, and is, a "part of a comprehensive plan for *regulating* the use of property * * *" (Emphasis ours), the ordinance both in its specific words and terms, *prohibits* the parking of a house trailer, by the owner thereof, upon his property within the corporate limits. Query: does the power to regulate include the power to prohibit?

> The power to regulate *does not* include the power to prohibit, see: *Gibbons v. Ogden,* 22 U. S. (9 Wheat.)

1, 6 L. Ed. 23; *In re McCoy,* 101 P. 419, 10 Cal. App. 116; *Madden v. State,* 75 P. 1023, 68 Kan. 658; *Chicago Motor Coach Co. v. City of Chicago,* 169 N. E. 22, 25, 337 Ill. 200, 68 ALR 834; *Johnson v. Town of Philadelphia,* 47 So. 526, 94 Miss. 34, 19 LRA, NS, 637, 19 Ann. Cas. 103; *Peace v. McAdoo,* 96 NYS 1039, 1041, 110 App. Div. 13 [and cases cited therein]; *Phelps Inc. v. City of Hastings,* 42 N. W. 2d 303, 152 Neb. 651.

And, further, to *regulate* necessarily involves the existence of the thing or act to be regulated, see:

Andrews v. *State,* 50 Tenn. (3 Heisk.) 165, 180, 8 Am. Rep. 8;

State ex rel. McMonies v. *McMonies,* 106 N. W. 454, 455, 75 Neb. 443, citing Horr. & B. Mun. Ord., Sec. 30;

State v. *Mott,* 61 Md. 297, 48 Am. Rep. 105;

Gordon v. *City of Indianapolis,* 183 N. E. 124, 125, 204 Ind. 79;

City of St. Louis v. *Atlantic Quarry & Const. Co.,* 148 S. W. 948, 950, 244 Mo. 479;

Peace v. *McAdoo,* 96 NYS 1039, 1041, 110 App. Div. 13 [and cases therein cited].

VII

Conclusion

In conclusion, it might be said that the ordinance which is herein drawn in question as repugnant to the prohibitions of the Fourteenth Amendment to the Constitution of the United States is an ingenious, though not altogether unique, endeavor to circumvent these constitutional provisions. It designates a certain "property" injurious to the general welfare and prohibits the same under penalty of fine and imprisonment; and it endeavors, by its terms, to preclude any constitutional attack upon the ordinance by making irrelevant evidence in disproof of such "prop-

erty'' being injurious to the general welfare. However, in so doing it infringes upon the due process clause.

The petitioner upon being convicted for violating this ordinance, by a general judgment, sought review, but was refused a proper review by virtue of erroneous reasoning, in direct conflict with the decisions of this Court.

Respectfully submitted,

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HAROLD B. WILLEY,

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1953

No. 293

WILLIAM E. COOPER

Petitioner,

vs.

DEWITT SINCLAIR, AS CUSTODIAN OF THE LAKELAND CITY JAIL,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

OPINION OF THE COURT BELOW

The petitioner has brought his petition for writ of certiorari to review the opinion of the Supreme Court of the State of Florida rendered in the case of William E. Cooper vs. DeWitt Sinclair, which opinion appears on pages 11 through 13 and 25 through 31 of the Transcript of Record filed herein, and is reported at 66 Sou. 2d 702.

II.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this

court under section 1257 Title 28 U. S. Code but the respondent respectfully shows that the petitioner is not entitled to the issuance of a writ of certiorari for the following reasons:

1. That the decision of the Supreme Court of the State of Florida is in accordance with previous decisions of the United States Supreme Court and Rule 38 (5 (a)) of the Supreme Court provides that certiorari will be granted only:
   "where a State court has decided a Federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."
2. The decision of the Florida Supreme Court rested on an adequate non-federal ground.
3. It appears from the record that more than 30 days have elapsed since the remanding of the petitioner and therefore the question is moot, or on the other hand, if the petitioner was not taken into custody then he would not be entitled to have reviewed, by writ of certiorari, a habeas corpus proceeding.

The argument and citation of the authorities in support of these grounds stated by respondent will appear later in the argument

Statement of Matter Involved

The petitioner's Statement of Matter Involved appears on (pp. 2-6) of the petition. We do not agree with the position taken by petitioner in the statement of matter involved hence are restating it herein.

The City of Lakeland, Florida, a municipal corporation, enacted an ordinance making it unlawful to park and/or store any camp car, housecar or trailer which is

commonly used for living or sleeping purposes upon a lot or parcel of land within the city, said ordinance appearing in full in pages 4 and 5 of the record, and there are excepted from the operation of the Ordinance such vehicles, when kept entirely in a closed building and not used for living or sleeping purposes, when located in a regular public camp as defined by ordinance 754 of the City of Lakeland or when parked and stored, for the purpose of sale, upon any lot, piece or parcel of land upon which the sale of such vehicles is permitted under the laws of the City of Lakeland. Petitioner did not show that he came under any of these exceptions. Said ordinance was passed as an integral part of a comprehensive plan for regulating the use of property within the corporate limits of said city, and under the police power granted to it by the laws of the State of Florida.

Section 176.02 and Section 176.04 Florida Statutes 1951 provide in part that:

> "For the purpose of promoting health, safety, morals, or the general welfare of the communities and municipalities of the State of Florida, said Municipalities may regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land and water for trade, industry, residence or other purposes." (Section 176.02)
>
> Regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air to prevent the overcrowding of land to avoid undue concentration of population; to facilitate the adequate provisions of trans-

portation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings, and encouraging the most appropriate use of land throughout said municipalities." (Section 176.04)

Said ordinance contained a legislative finding as follows:

> "That Whereas, it has been found and determined by the City Commission of the City of Lakeland that camp cars, house cars, or trailers, commonly used for living and sleeping purposes, have been parked and/or stored upon lots, pieces, and parcels of land within the City limits of the City of Lakeland, and that said vehicles have been regularly or intermittently used for living or sleeping purposes, and when not so used the presence of such vehicles greatly reduce the value of the properties abounding the location of such vehicles and in general injures and jeopardizes the health and general welfare of the citizens of the City of Lakeland."

The petitioner did have his day in court, was tried and convicted of a violation of the ordinance (R.2) was fined the sum of twenty-five dollars or thirty days. Immediately thereafter the petitioner applied for a writ of habeas corpus (R. 1-2) and the writ issued (R. 2). The respondent filed its return to the writ making a copy of the ordinance a part of the return, stating, in part, as follows:

> "The respondent denies that said ordinance No. 815 is not (fol. 6) reasonable, or is in conflict with the constitution of the State of Florida or of the United States, or that said ordinance in its application deprives the owner of a reasonable use and enjoyment of his own property, thereby depriving him thereof without

due process of law or just compensation, but affirmatively states that said ordinance regulates the use of property in a constitutional manner, and denies that said ordinance attempts to limit the use of property in an unconstitutional manner.

The respondent further says that the said ordinance is an integrated part of a comprehensive plan of regulating the use of property within the whole of the corporate limits of the City of Lakeland and has been enacted in the exercise of the police power granted it by the laws of the State of Florida, and the respondent, having fully made return and answer to the writ of habeas corpus in this behalf, respectfully prays that the petitioner be remanded to the custody of the respondent."

This return was not traversed nor denied. The cause came on for hearing on the petition and the return of the respondent; no testimony was offered. The order was entered (R. 6) and the Circuit Court found that petitioner by his attorney had "failed to show that he was illegally detained and deprived of his liberty." (R. 6). The matter was appealed to the Supreme Court of the State of Florida and the Florida Supreme Court upon hearing and after rehearing, affirmed the decision of the Circuit Court. We do not agree with the petitioner's interpretation of the decision of the Florida Supreme Court. The first decision and opinion of the Florida Supreme Court appears on pages 11, 12, and 13 of the record and the decision on rehearing appears on pages 25 to 31 of the record and speak for themselves.

SUMMARY OF ARGUMENT

1. *Jurisdiction:* The decision of the Supreme Court of Florida is in accordance with decisions of the Supreme Court of the United States upholding the

validity of similar zoning laws. Further, respondent would show that the question before the court is either moot or that petitioner is not in custody so as to entitle him to a review of habeas corpus proceedings. It will also be shown that the decision of the Florida Supreme Court rested on an adequate non-Federal grounds.

2. *Discussion of Questions:* Respondent shows that petitioner has not shown any unconstitutional application of the ordinance to himself. The Supreme Court of the United States has repeatedly sustained the validity of ordinances similar to the ordinance under attack.

ARGUMENT

Jurisdiction

The petitioner is not entitled to a granting of the writ for the reason that the Supreme Court of Florida has determined the questions involved in accordance with previous decisions of this Honorable Court.

As recently as 1950, in the case of Sandard Oil Co. vs. Tallahassee, 340 U.S. 892 the United State Supreme Court refused to issue certiorari to the Circuit Court of Appeals for the Fifth Circuit, in the case of Standard Oil Co. vs Tallahassee, 183 F 2nd 410, which case involved an ordinance enacted under the same section of Florida statutes as the case at bar. The Fifth Circuit Court of Appeals said, in that case:

> "Subsequently, practically the same grant of authority was given all municipalities in the State through the enactment of Chapter 19,539 Laws of Florida, Acts of 1939, F.S.A. 176.01 et seq."

and further in that decision:

> 'The courts have generally recognized that they should not inhibit a reasonable exercise of the zoning power of a municipality carried out pursuant to legislative grant by the state. Moreover, it has been held that a presumption of validity attends the enactment of such zoning ordinances.
>
> City of Miami Beach vs Ocean & Island Co. 147 Fla. 480, 3 So. 2d 364; Godsen vs Town of Surfside, 150 Fla. 614, 8 So. 2d 497.
>
> "Legislation conferring the zoning power upon various Florida municipalities has been repeatedly sustained as constitutional by the Supreme Court of Florida (citing cases) and in such cases we are not permitted to substitute our judgment for that of the city council, as to question the wisdom or policy of that body in adopting the ordinance under attack, so long as it does not infringe constitutional guaranties."
>
> "The power of a municipality to require by ordinance the discontinuance of an existing property use also appears to be well established law in Florida"

Attention is respectfully called to the fact that the Statute of Florida referred to in this opinion is the same one under which the City of Lakeland acted in passing the Zoning Ordinance under attack.

And this court also denied certiorari in the case of Geneva Investment Co. v. City of St. Louis, 301 U.S. 692, in which case the Circuit Court of Appeals, reported at 87 2d 83, stated:

> "Every exercise of police power is apt to adversely affect the property interest of somebody . . . . . If the ordinance bears a rational relationship to public health and public safety, it must be upheld . . . . . With the wisdom or expediency of the ordinance we are not

concerned, if it is within the legislative power of the city, all presumptions must be indulged in favor of its validity."

This court has repeatedly given its sanction to such zoning and use ordinance. The decision of the Florida Supreme Court is clearly consistent with the opinions rendered by this court in the cases of Euclid vs Ambler Realty Co. 272 U.S. 365; Zahn vs Board of Public Works of City of Los Angeles, 274 U.S. 325; St. Louis Poster Advertising Co. vs St. Louis, 249 U.S. 268, which cases will be quoted and thoroughly discussed in the argument appearing hereafter.

Respondent shows that the decision of the Florida Supreme Court rested on an adequate non-federal ground, that is, that the petitioner did not show that he was affected by or came under any allegedly invalid part of the ordinance; in habeas corpus the burden of proof was on him. He did not ask for a bill of particulars in the municipal court; he did not traverse the return to the writ of habeas corpus.

On the lack of showing made by him the Florida Supreme Court said (p. 29 R.):

"the constitutionality of the ordinance so far as it affects the right of the appellant must be upheld"

The decisions of this Honorable Court are clear that if a state court determines a question on adequate non-federal grounds, then this Court will not take Jurisdiction.

The following cases are in line with this proposition:

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. (Citing cases.) The reason is so obvious

that it has rarely been thought to warrant statement. It is found in the partitioning of Power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion".....

"But what to do with cases in which the record is ambiguous but presents reasonable grounds to believe that the judgment may rest on decision of a federal question has long vexed the Court. In many cases the answer has been a strict adherence to the rule that it must affirmatively appear that the federal question was decided and that its decision was essential to disposition of the case; and that there where it is not clear whether the judgment rests on a Federal ground or an adequate state one, this Court will not review."

Herb v. Pitcairn, 324 U.S. 117 @ 125 89 L. Ed 789 @ 794

and in the case of Richardson v. Scott, 276 U.S. 128, this court said:

"as the decision of that court was rested, and may rest, on this rule — an adequate non-Federal ground — the writ must be dismissed"

"If it does not appear upon which of two grounds the judgment was based and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." (Citing numerous cases)"

'This court should not be reaching for constitutional questions to cast doubt upon state legislation not before the court."

Buck v. California (343 U.S. 99, 96 Law Ed. 775)

"It is settled law that where the record discloses that the judgment of a state court was based not alone upon a ground involving a Federal question, but also upon another and independent ground, broad enough to maintain the judgment, this court will not take jurisdiction to review such judgment, and will dismiss a writ of error, brought for that purpose. Eustis v. Bolles, 150 U.S. 361, 366, 37 L. ed. 1111, 1112, 14 Sup. Ct. Rep. 131; Dibble v. Bellingham Bay Land Co. 163 U.S. 63, 69, 41 L. ed. 72, 74, 16 Sup. Ct. Rep. 939; Allen v. Arguimbau, 198 U.S. 149, 155, 49mL. ed. 990, 993, 25 Sup. Ct. Rep. 622; Adams v. Russell, 229 U.S. 353, 358, 57 L. ed. 1224, 1226, 33 Sup. Ct. Rep. 846; Cuyyahoga River Power Co. v. Northern Realty Co., 244 U.S. 300, 304, 61 L. ed. 1153, 1157 37 Sup. Ct. Rep. 643 .

Hence, as the decision of the Court of Appeals as to the effect of the writ of habeas corpus was broad enough to maintain the judgment, independently of its decision as to the constitutional question, the writ of error is dismissed."

New York ex rel. Doyle v. Atwell (261 U.S. 590, 67 Law Ed., 814)

Respondent shows further that the question presented to this court is either moot or that the petitioner is not in custody so as to warrant review, by this Court, of a habeas corpus proceeding.

The record discloses that petitioner was fined twenty-five dollars or thirty days. Petitioner recites that he was remanded to custody (R-31). More than thirty days have elapsed since that date.

This court has clearly indicated its position in determination of moot questions presented in habeas corpus proceedings, in the case, Re James Lincoln 202 U.S. 178:

"In Ex parte Baez 177 S.U. 378 44 L. Ed. 813, which

was an application for a writ of habeas corpus, it appeared that before a return to the writ could be made of other action taken, the restraint of which petitioner complained would terminate, and it was held that the application for the writ should be denied. Indeed, the case at bar in principle is not unlike Mills vs Green 159 U.S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132, Flour Inspectors v Glover, 160 U.S. 170, 40 L. Ed. 382, 16 Sup. Ct. Rep. 321, Kimball v. Kimball, 174 U.S. 158, 43 L. ed. 932, 19 Sup. Ct. Rep. 639; and Jenes v. Montague, 194 U.S. 147, 48 L. Ed. 913 24 Sup. Ct. Rep. 611, in each of which, intermediate the ruling below and the time for decision here, events had happened which prevented the granting of the relief sought, and the appeals or writs of error were dismissed on the ground that this court did not spend its time in deciding a moot case."

Further, if petitioner is at liberty on bond or is not presently in custody, this Court has clearly stated that it will not issue a writ of habeas corpus, nor, by the same token, will it review a habeas corpus proceeding by certiorari.

"It is well settled that a person out on bail is not so restrained of his liberty as to be entitled to a writ of habeas corpus. As actual or physical restraint is required in order that such a writ may issue."

Baker vs Grice 169 U.S. 284; Slattings vs Splain 253 U.S. 39.

Questions Presented

The questions, as presented by petitioner, appear on pages 11, 12 and 13 of the Petitioner's Petition and brief, but Respondent disagrees with questions involved, as stated by petitioner, and restates the actual questions involved, as follows:

First Question: Is the petitioner, who was convicted

of violating a municipal ordinance and subsequently brought habeas corpus proceedings, in an attempt to question the constitutionality of such ordinance, entitled to be discharged where he has failed to show any unconstitutional application of the ordinance to himself?

The Supreme Court of Florida answered this in the negative and stated:

> "In all instances when the constitutionality of a law is attacked such an issue will not be ruled on except at the suit of a person affected adversely by the allegedly invalid aspect of the law."

The petitioner is not entitled to search into every application of the ordinance to determine any possibility of oppression or arbitrary action. He failed to show, as pointed out in the decision rendered by the Florida Supreme Court, that he was oppressed or that the ordinance was unreasonable as applied to him. (R-27)

This court has repeatedly held that litigants can only attack the constitutionality of statutes where they can show that the unconstitutional feature injures such litigant. Such was held in the case of Premier-Pabst Sales Co. v. Grosscup, 298 U. S. 226, wherein this court said:

> "We have no occasion to consider the constitutional question because the plaintiff is without standing to present it. One who would strike down a state statute as obnoxious to the constitution must show that the alleged unconstitutional feature injures him."

See also Heald v. District of Columbia 259 U. S. 114; U. S. v. Chandler, Dunbar Water Co., 229 U. S. 53; Strauss v. Foxworth 231 U. S. 162.

The second and third questions presented by petitioner may properly be stated as follows: May a municipal corporation, acting pursuant to state law, enact ordinances regulating the parking of house trailers and camp cars, used for living purposes, as a part of a comprehensive zoning plan?

The Supreme Court of Florida answered this in the affirmative.

The authority to zone property and designate the use thereof, by a municipality has long been recognized by the Supreme Court of Florida and the Supreme Court of the United States.

See Miller v. Quigg 100 So. 270, where the Florida Supreme Court, recognizing the problem, stated:

> "During the winter or tourist season large numbers of persons flock to Florida, and fill our hotels, although many live in tents in localities known as tent cities, camp grounds, tourist camps, etc.
> A large number of people living in proximity in tents, without sanitary regulations, is very apt to produce sickness, and it is to promote and preserve the public health that the ordinance was enacted."

And also Ford v. Miami: 1 So. 2nd 642, p. 645:

"In this State, it is no longer questioned that a municipality, acting under legislative authority, may be vested with the power to enact a valid zoning ordinance and that a general attack thereon will ordinarily fail; nor is it questioned that the right of an urban owner to the free use of his property may be regulated by a legitimate exercise of the police power, and when so asserted, fairly and impartially in the interest of the public health, safety, morals or general welfare, the courts will not substitute their judgment for that of the public officials duly authorized in the premises unless it clear-

ly appears that their action has no just foundation in reason and necessity."

And the particular problem of trailer parking has been decided by the Supreme Court of Alabama in the case of Davis v. City of Mobile, 16 So. 2nd 1, where the Alabama Court said:

> "The city could very properly provide regulations for trailer parking as living quarters or for business purposes reasonably adapted to promote traffic convenience, safety, morals and health, and can make such regulations relating to trailer camps or tourist camps. See 115 A. L. R. 1399; State v. Hayes Inv. Corp., 13 Wash. 2d 306, 125 P. 2d 262; Cady v. Detroit, 289 Mich. 499, 286 N. W. 805; People v. Hedgcock, 106 Colo. 300, 104 P. 2d 607; Miller v. Quigg, 87 Fla. 462, 100 So. 270. And establish zoning laws in that connection by valid ordinances..."

This Alabama case was cited with favor by the Supreme Court of Florida in the case at bar.

From Maine to Florida the necessity for such regulation is recognized. In support of this we cite the case of York Harbor Village Corp. v. Lebby 126 Me. 537, 104 A 382:

> "The legislature may have determined that the tendency of camping grounds maintained as a business is to attract a temporary, promiscuous, nomadic, conjested population living in tents or under conditions making difficult the enforcement of police and sanitary regulations. This classification is not wholly unreasonale."

All of the state cases, cited above, are in conformity with the decisions of this Court and are totally consistent with the views of this court in its determination of the constitutionality of zoning and related ordinances.

As far back as 1883 this Court has recognized the authority of municipal governments to regulate and prohibit various activities within cities and so stated in the case of Francis Barbier v. Patrick Connolly, 113 U. S. 27:

"In this case we can only consider whether the 4th section of the ordinance of the city and county of San Francisco is in conflict with the Constitution or laws of the United States. We cannot pass upon the conformity of that section with the requirements of the Constitution of the State. Our jurisdiction is confined to a consideration of the federal question involved, which arises upon an alleged conflict of the 4th section in question with the 1st section of the 14th amendment of the Constitution of the United States. No other part of the Amendment has any possible application.

That 4th section, so far as it is involved in the case befor the police Judge, was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash houses, within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock in the morning of the following day. The prohibition against labor on Sunday is not involved. The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. And it would be an extraordinary usurpation of the authority of a municipality if a federal tribunal should undertake to supervise such regulations. It may be a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, that occupations, in which fires are constantly required, should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least any correction of their action in such matters can come only from state legislation or state tribunals."

In the case of St. Louis Poster Advertising Company

v. St. Louis 249, U. S. 268, involving the prohibiting of billboards in certain areas of the city, the United States Supreme Court said:

> "Of course, the several restrictions that have been mentioned are said to be unreasonable and unconstitutional limitations of the liberty of the individual and of rights of property in land. But the argument comes too late. This court has recognized the correctness of the decision in St. Louis Gunning Adv. Co. v. St. Louis, 235 Mo. 99, 137 S. W. 929, followed in this case, that billboards properly may be put in a class by themselves and prohibited 'in the residence district of a city, in the interest of the safety, morality, health, and decency of the community.' Thomas Cusack Co. v. Chicago, 242 U. S. 526, 529, 530, 61 L. ed. 472, 475, L. R. A. 1918 A, 136, 37 Sup. Ct. Rep. 19, Ann. Cas. 1917 C. 594."

Following the decisions above referred to the Supreme Court of the United States in the case of Gorieb v. Fox, 274 U. S. 603, upholding another zoning ordinance, said:

> "Since upon consideration we are unable to say that the ordinance under review is 'clearly arbitrary and unreasonable, having no substantial relations to the public health, safety, morals, or general welfare, we are bound to sustain it as constitutional'."

Another case decided by this court, Fisher v. St. Louis 194 U. S. 361, involved the location of barns and dairies within a municipality, and this court stated at page 370 of that opinion:

> "The power of the legislature to authorize its municipalities to regulate and suppress all such places or occupations as, in its judgment, are likely to be injurious to the health of its inhabitants, or to disturb people living in the immediate neighborhood by loud noises or offensive odors, is so clearly within the police power as to be no longer open to question."

In the case of Zahn v. Board of Public Works of the City of Los Angeles, 274 U. S. 325 another case involving a zoning ordinance in which there were residential and exclusive business sections set forth, this Honorable Court said:

> "The most that can be said is that whether that determination was an unreasonable, arbitrary or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question."

This Honorable Court in the case of Euclid vs Ambler Realty Co. 272 U. S. 365, upheld a zoning ordinance which was attacked on the grounds that it was in derogation of the 14th Amendment to the Federal Constitution. This case was decided in 1926 when zoning was comparatively new. The Supreme Court of the United States, with clarity, recognized the need for and foresaw, the increasing need for zoning and in the opinion upholding the Zoning Ordinance said, at page 368:

> "Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations of our day, for reasons analogous to those which . . . traffic regulations, which, before the advent of automobiles and

rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. *And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.*
Emphasis Ours

The court in the case of Euclid vs. Ambler Realty Co., supra, quoting with favor the Supreme Court of Illinois in Aurora vs. Burns 319 Ill. pp. 93-95, 149 N.E. 784, in sustaining a comprehensive building zone ordinance dividing the city into eight districts, including exclusive residential districts for one and two-family dwellings, churches, educational institutions and schools, said:

> "The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the state, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly. With the growth and development of the state the police power necessarily develops, within reasonable bounds, to meet the changing conditions . . .
>
> " . . The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful."

And at page 388 of that opinion, this court further stated:

> "Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the things considered apart, but by considering it in connection with the circumstances and the locality. Sturges v. Bridgman L.R. 11 Ch. Div. 852, 865—C.A. nuisance may be

merely a right thing in a wrong place—,like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." Radice vs New York 264 U.S. 292 68 L. Ed. 690, 694, 44 Sup. Ct. Rep. 325."

A portion of the opinion in Crowley v. Christenson, 137 U. S. 86, dealing with the problem of intoxicating liquor, but pertinent here because of a discussion of the general limitations on the right to the use of property, when it conflicts with the police power of the State, is set forth below:

"It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. The right to acquire, enjoy and dispose of property is declared in the Constitutions of several states to be one of the inalienable rights of man. But this declaration is not held to preclude the Legislature of any State from passing laws respecting the acquisition, enjoyment and disposition of property . . . . And as to the enjoyment of property the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. . . "

"For the pursuit of any lawful trade or business, the law imposes similar conditions. Regulations respecting them are almost infinite, varying with the nature of the business. Some occupations by the noise made

in their pursuit, some by the odors they engender, and some by the dangerous character of the articles used, manufactured or sold require, also, special qualifications in the parties permitted to use, manufacture or sell them."

Petitioners cite short quotations from:

U.S.A. vs Carolene Products Company 304, U. S. 144 — 82 L. Ed. 1235 Inhabitants of York Harbor Village Corp. vs. Libby 140 A-382, 126 Me 537, and Lawton vs Steele 152 U.S. 140; 38 L. Ed. 149.

In none of these cases did the Supreme Court hold the statutes or ordinances under attack invalid or unconstitutional. Respondent has attempted to cite cases dealing directly with zoning and regulations relating to use of property.

Conclusion

The respondent is in the same position as the municipalities in the cases cited above. The governing body of the City of Lakeland has a right to enact zoning and building ordinances and is certainly authorized to consider the problem of sewage facilities, police and fire protection encountered in the indiscriminate placing and parking of house trailers and camp cars.

Respondent respectfully submits that the Petitioner is not entitled to the relief sought under the rules of this Honorable Court, and the writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 293

WILLIAM E. COOPER,

Petitioner,

vs.

DEWITT SINCLAIR, AS CUSTODIAN OF THE LAKELAND CITY JAIL,

Respondent

BRIEF OF PETITIONER IN REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, William E. Cooper, pursuant to the Revised Rules of the Supreme Court of the United States, and, more particularly, Rule 38, Section 4(a) thereof, herewith files this his Reply Brief, directed to the Brief of Respondent in Opposition to Petition for Writ of Certiorari, that was heretofore filed in this the above styled cause by the respondent, DeWitt Sinclair, as Custodian of the Lakeland City Jail.

Statement of Matter Involved

A concise statement of the matter involved herein may be found in the Petition for Writ of Certiorari filed in this cause, under the heading of "Statement of Matter Involved" (Petition, pages 2 through 6). Petitioner herein relies upon, and reasserts the same; and, says that the respondent has endeavored to set forth the matter involved in an argumentive manner, designing the same to fit his contentions and conjectures without regard to the factual situation.

Jurisdiction

Petitioner has thoroughly set forth in his Petition for Writ of Certiorari (Petition, pages 6-11), and in his Brief in Support of Petition for Writ of Certiorari (Brief, pages 16-17, 18-19), the jurisdiction of this Court to review, upon certiorari, the case at bar.

However, in view of the fact that the respondent has, in his brief in opposition to the petition for writ of certiorari herein, for the first time since this cause has been heard upon review, taken the new and inconsistent position that the question presented by petitioner is a "moot question", it is necessary that the following matter be added.

Rule 45, *Sections* 2 and 4, of the *Supreme Court of the United States Revised Rules,* provide:

> *Section* 2. "Pending review of a decision discharging a writ of habeas corpus *after it has been issued,* the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, or enlarged upon recognizance with surety, as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case." (Emphasis ours.)
>
> *Section* 4. "The initial order respecting the custody or enlargement of the prisoner pending review, as also

any recognizance taken, shall be deemed to cover not only the review in the intermediate appellate court *but also the further possible review in this court;* and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard." (Emphasis ours.)

On the 29th day of July, A. D. 1952, the Circuit Court, Tenth Judicial Circuit, in and for Polk County, Florida, issued the writ of *habeas corpus* upon the petitioner's petition therefore, and directed to the respondent (herein petitioner and respondent, respectively) and released the petitioner upon recognizance (R. 2-3).

After the writ had issued, and respondent made his due return thereto on the 5th day of August, A. D. 1952, the said Circuit Court, after taking the matter under advisement and on the 11th day of August, A. D. 1952 (although in inarticulate words), discharged the writ of *habeas corpus* theretofore issued, and remanded the petitioner (R. 6). However, upon petitioner receiving notice thereof, petitioner filed his motion for allowance to appeal (R. 7), which the said Circuit Court allowed (R. 7-8); *thus and thereby* removing the finality of its judgment, causing the execution thereof then to be held in abeyance pending the review thereof by the Supreme Court of the State of Florida. The *Record* in this cause adequately reflects the foregoing by the conspicuous absence of any order commanding execution, or fixing a date for the commencement of any such execution of judgment; nor reflecting execution thereof by the petitioner (also petitioner herein).

Argument on the foregoing appears hereinafter in this Reply Brief under the heading of "Argument".

The Questions Presented

The questions presented by this petition for writ of certiorari are both clearly and concisely set forth in the said

petition, and in the interest of brevity the same are, by reference, adopted herein (See: *Petition,* pages 11-13). Respondent has elected to ignore those questions presented by the petitioner (See: *Respondent's Brief in Opposition to Petition for Writ of Certiorari,* page 11); and has formulated certain purported questions of his own (See: *Respondent's Brief in Opposition to Petition for Writ of Certiorari,* pages 11, 12, and 13).

Those purported questions, presented by the respondent, are mere argument presented in the form of a question and *are not anywhere substantiated by the record!* Respondent has, in his purported "questions", assumed facts that are not found in the record, and are not reasonable and logical inferences to be assumed from the record.

The "questions" formulated by the respondent are directed to new matters and issues which was not urged, argued or considered by the Courts below, and the same are not relevant to the petition for writ of certiorari herein filed. And, on the other hand, if the same had been urged in the Courts below, respondent has not timely filed a petition for writ of certiorari to review the same and they are not before this Honorable Court for consideration; respondent is limited to the issues before this Court as the same are found in the petition for writ of certiorari. It is not the prerogative of the respondent, in his brief in opposition to the petition for writ of certiorari, to present *irrelevant and moot* questions.

Argument upon the foregoing appears hereinafter in this Reply Brief under the heading of "Argument".

Reasons Relied On for the Allowance of the Writ

The reasons relied upon for the allowance of the writ of certiorari in this cause are succinctly set forth in the Petition for Writ of Certiorari in this cause (See: pages 14-15 thereof). Petitioner has at that point, immediately

hereinabove set forth, presented precisely that which the United States Supreme Court Revised Rules (Rule 38, Section 5(a)) indicates to be the character of reason for which this Court will grant certiorari:

> *Rule* 38, *Section* 5(a): "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably *not in accord with applicable decisions of this court.*" (Emphasis ours.)

Specification of Error

Again, at the risk of being repetitious, the specification of error is clearly and concisely set forth in the Petition for Writ of Certiorari (See: *Petition*, page 16).

Respondent presents nothing whatever in the *Brief of Respondent in Opposition to Petition for Writ of Certiorari* to indicate that there is even a doubt as to the existence thereof. As a matter of fact, Respondent's entire brief is but a "Maverick in the Wilderness", which is designed to do nothing more than to mislead this Court and to confuse the real issues in a maze of irrelevancy.

Argument upon the foregoing appears in its logical sequence, under the heading of "Argument".

Summary of Argument

1. Jurisdiction. Where the opinion of the State Court of last resort reflects that a municipal ordinance was drawn in question, as repugnant to the Constitution of the United States, and the decision of the court was in favor of its validity, jurisdiction thereafter, to pass upon the validity of the ordinance, rests in the Supreme Court of the United States.

Petitioner was enlarged upon recognizance for and during his appeal to the intermediate appellate court, the State Court of last resort in this instance, therefore he is by this

Court deemed, for purposes of review, yet upon such enlargement.

Where the freedom of the petitioner is dependent upon the decision of this Court, upon the issues enumerated in his petition for writ of certiorari, the questions presented are anything but moot.

Where the petitioner puts the validity of an ordinance into issue, as being repugnant to the 14th Amendment of the United States Constitution, and as being repugnant to the State Constitution; the decision of the State Court of last resort, thereupon, that the ordinance is valid, is not such a decision that it rests upon grounds *independent of a federal question* that it is not within the jurisdiction of this the Supreme Court of the United States.

2. The ordinance which is "drawn in question" in this action *is not a zoning ordinance,* but rather a police regulation.

The ordinance involved herein is not directed at the regulation of real property, nor is it a zoning ordinance; it is a police regulation which is directed at prohibiting "house trailers" which are not real property.

The ordinance does not regulate "house trailers", but rather prohibits the same, contrary to the prohibitions of the 14th Amendment of the Constitution of the United States.

3. The *Brief of Respondent in Opposition to Petition for Writ of Certiorari* is misleading and confusing, and it is mainly, if not entirely, drawn upon matters that are not germane, but irrelevant, to the issues made in the *Petition for Writ of Certiorari* herein.

The Respondent's Brief shows nothing whatever to bar, preclude or overcome the issues and matters in the *Petition for Writ of Certiorari,* over which this Court has absolute jurisdiction, and which were, by the State Court of last resort, decided in a manner that is in irreconcilable conflict

with the decisions of the Supreme Court of the United States.

Argument

The petitioner, in his original pleading in the first of the Courts below, that is, in the Circuit Court of the Tenth Judicial Circuit, in and for Polk County, Florida, and the Supreme Court of the State of Florida recognized that the petitioner's contention, from his original pleading is and was:

> "• • • 'that the ordinance . . . is not reasonable . . . and . . . *is in conflict with* the Constitution of the State of Florida and *the Constitution of the United States,* in that the ordinance in its application deprives the owner of a reasonable use and enjoyment of his own property . . . without due process of law or just compensation . . . that the . . . ordinance does attempt to limit the use of property, and in an unconstitutional manner.'" (Emphasis ours) (R. 25-26, opinion of State Court of last resort citing from petitioner's original pleading [R. 1]).

Unquestionably, presented a Federal Question in every sense of the words; that is, that the ordinance is repugnant to the Constitution of the United States, more particularly, to the "due process clause" of the 14th Amendment.

This Court has unequivocally said:

> "Where it appears from the opinion of the State court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction • • •" *Charleston Federal Savings & Loan Assn., etc.* v. *Alderson,* 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624.

True, the case at bar does not involve a State *statute;* however, that presents no problem whatever, for this Court has consistently held that ordinances passed under the

police power derived from the state (so held by the court in the instant case, R. 29) are "state action" within the prohibition of the due process clause of the 14th Amendment, and *are reviewable by this Court.* See:

Carlson v. *People of the State of California,* 310 U. S. 106, 84 L. Ed. 1104, 60 S. Ct. 746, rehearing denied 310 U. S. 657, 84 L. Ed. 1420, 60 S. Ct. 1072;

Lovell v. *City of Griffin, Ga.,* 303 U. S. 444, 82 L. Ed. 949, 58 S. Ct. 666.

That the ordinance herein drawn in question was passed under the police power derived from the state, see: Opinion on rehearing granted (at R. 29).

A case that would more clearly show a jurisdiction for review in the Supreme Court of the United States would indeed be hard to find.

Respondent argues, in his brief in opposition to the petition for writ of certiorari, and apparently frivolously, that the instant case was decided upon an *independent and adequate* non-Federal grounds. Therein saying that the petitioner has failed to show that he was affected or came under any of the allegedly invalid aspects of the ordinance. However, petitioner most decisively pointed out that he was convicted by a *general verdict and judgment* of guilty of violating *the* ordinance, not any particular part; see: *Petition for Writ of Certiorari,* pages 8, 11 and 14; *Brief in Support of Petition for Writ of Certiorari,* 19-20; and, *Record* (Answer and Return to Writ of *Habeas Corpus*), page 3, where the respondent *admits* that the petitioner was convicted of violating *the* ordinance, a general verdict.

This Court most recently said, that where one is convicted upon a general verdict of violating a statute or ordinance, and an attack is made upon the validity of the ordinance, it is necessary that the entire ordinance be reviewed, and if *any* part is invalid, the suitor must be released, for all the

general verdict reflects, it can not be ascertained whether he was convicted upon that invalid portion. See:

Terminiello v. *Chicago,* 337 U. S. 1, 93 L. Ed. 1131, 69 S. Ct. 894, rehearing denied 337 U. S. 934, 93 L. Ed. 1740, 69 S. Ct. 1490;

Stromberg v. *California,* 283 U. S. 359, 75 L. Ed. 1117, 51 S. Ct. 532, 73 ALR 1484.

Therefore, pursuant to the authority of the foregoing cases, petitioner does not need to show that he is affected by the alleged invalid aspect, but only that he is imprisoned upon a general verdict of guilty of the violation of the ordinance and that a part of the ordinance is invalid.

The foregoing *is one of the very grounds* upon which the petitioner seeks the writ of certiorari from this Court. Respondent in his brief in opposition to the petition for writ of certiorari, cites and states *nothing* in an endeavor to show that the State Court of last resort decided this correctly, or to distinguish this case from the aforesaid rule in the *Terminiello* case, and the *Stromberg* case, *supra;* he merely "begs the question", and attempts to make issues of matters that are purely irrelevant.

Respondent cites the case of *Richardson* v. *Scott,* 276 U. S. 128, 72 L. Ed. 497, 48 S. Ct. 264, upon the proposition that if a judgment of the State Court was based upon an adequate and *independent* state grounds, then this Court would not have the jurisdiction to review, or would not *take* the jurisdiction to review the judgment. However true that may be, the respondent has failed to show that the facts of this case are such that the judgment of the Supreme Court of the State of Florida was based upon grounds that are *adequate and independent* of the Federal question and grounds. The *Record* clearly indicates that such was not the case; that the judgment in this case rests squarely, if not exclusively, upon the Federal question; and, that there was no *adequate*

or *independent* state grounds upon which the judgment could rest.

This cause fully evidences that the petitioner was enlarged upon recognizance upon filing his petition for writ of *habeas corpus,* and pending the return of the respondent thereto, in the Circuit Court, Tenth Judicial Circuit, in and for Polk County, Florida (R. 2-3). It does further reflect that the said Circuit Court, after due return by the respondent in compliance to the writ of *habeas corpus,* took the matter under advisement, entering its order some days later (R. 6). But, it is also clear that the said Circuit Court, *after* entering that order, and upon the motion of the petitioner, entered its order *permitting and allowing* an appeal to the Supreme Court of Florida (R. 7-8).

The Supreme Court of the State of Florida is not empowered to hear and determine "moot" questions, citations thereon would serve no purpose and would be superfluous. It follows without saying that "moot" questions could not be heard by the Supreme Court of Florida because the said Circuit Court might *allow* or *permit* an appeal.

The Supreme Court of the State of Florida *heard* this cause upon appeal, and again, upon rehearing, each time more than thirty days after the "order" of remand. Apparently, the Supreme Court of the State of Florida was thoroughly satisfied that the order *permitting* the appeal from the order and judgment of the said Circuit Court, *stayed* and held in *abeyance* the "order" of remand; else the Supreme Court of the State of Florida had no power whatever to hear the cause involved herein upon appeal. That action of the Supreme Court of the State of Florida, treating the "order" of remand as stayed for and during the appeal, is conclusive and this Court is bound to so recognize the same; it is a state question *not a Federal question,* and it is not brought before this Court for review by the petition for writ of certiorari filed herein.

Since the "order" of remand was stayed for and during the appeal to the intermediate appellate court, the Supreme Court of the State of Florida, it is to be so deemed stayed for and during the review sought in this Court. See: *United States Supreme Court Revised Rules, Rule* 45, *Section* 4,

> "The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, *shall be deemed to cover* not only the review in the intermediate appellate court but also *the further possible review in this court;* and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard." (Emphasis ours.)

Clearly and unequivocally, the imprisonment of the petitioner yet remains stayed, and is contingent upon the decision of this Court; this cause is a "live" case and controversy in every sense of the words, and is anything but "moot".

Lastly, upon the matter of respondent's contention that petitioner presents a moot question, it ought be noted that there is no reflection in the record that the imprisonment of the petitioner is completed, or that it will be completed, at the time this Honorable Court makes its considered opinion upon the petition for writ of certiorari herein filed. And, it ought be noted that the respondent has never before, in the entire course of the review in this cause, advanced the proposition that this question is "moot"; he has at all times heretofore treated this cause stayed pending review; he has at no time endeavored to have enforced, the "order" of remand entered (but superseded) by the Circuit Court below.

Respondent, in his brief in opposition to the petition for writ of certiorari, has entered upon great elaboration with regard to the ordinance, which is "drawn in question", being a *zoning* ordinance. This, undoubtedly, is the most

serious error the respondent might have made in his brief. This is the very first time that there has been made any mention of the ordinance being a *zoning* ordinance. Neither the Circuit Court below, the Supreme Court of the State of Florida below, nor the petitioner or *respondent, at any time below* endeavored to say that the ordinance is, or was, a *zoning* ordinance. On the contrary, the ordinance was at all times, by all parties and all courts, considered to be solely a "police regulation".

The ordinance is specifically directed at regulating "house trailers", not real property; and a "house trailer" is not *real* property, see: *Stewart* v. *Carrington,* 119 NYS (2d) 778.

The *Record* is absolutely void of any showing that this ordinance was enacted in conformity with the requisites of passing a zoning ordinance. Had it ever been heretofore proffered to be a zoning ordinance, petitioner would have required record evidence to show that the same was validly enacted, that is, in strict conformity with those measures and steps required in enacting a zoning ordinance.

The ordinance involved herein has no relation whatever to the zoning, for it prohibits *all* private parking of an unenclosed "house trailer" upon one's property, except that parking incidental to a duly licensed trailer dealer transacting sales; and this without regard to the zoning that is prevalent in that particular district of the City of Lakeland whereat such trailer might be situated or located.

Also, the ordinance was held by the State Court of last resort, the Supreme Court of the State of Florida, to be an ordinance enacted pursuant to the police power, a "police regulation", not a zoning ordinance (R. 29). The ordinance itself, shows conclusively that it was passed as a "police regulation", *nowhere* does it endeavor to be a zoning ordi-

nance. Any testimony to the effect that it was intended to be a zoning ordinance would be inadmissible, for

> "* * * the authorities are in harmony in excluding evidence of a different fact from that recorded on the records of local legislative bodies, offered for the purpose of contradicting *or altering* such record." 20 *Am. Jur.*, Evid. Sec. 1165, p. 1018 [and cases cited therein]. (Emphasis ours.)

This rule is most stringently applied in the instance of legislative enactments, even more so than in the instance of legislative records. Therefore, clearly, the respondent cannot at this time urge that the ordinance was a *zoning* ordinance, for such is not reflected by the ordinance *itself*, and even if it might be so construed, such is not thusly reflected by the *Record* in this case at bar. It is a gross departure from the previous position of the respondent, and inconsistent therewith.

A fortiori, that though all the matters cited by the respondent with regard to zoning ordinances are correct (and petitioner neither admits nor denies that those matters are by the respondent correctly construed or cited), they are of no avail whatever, for they involve *zoning* ordinances, and not simple, "police regulations", and are wholly irrelevant to the issues presented to this Honorable Court. Respondent's argument and citations thereon, to the petitioner, appear to be designed to confuse and mislead the Court as to the real and relevant issues herein.

Respondent, in his brief in opposition to the petition for writ of certiorari herein, says:

> "Further, if petitioner is at liberty on bond or is not presently in custody, this Court has clearly stated that it will not issue a writ of habeas corpus, nor, by the same token, will it review a habeas corpus proceeding by certiorari.";

followed by the following excerpt and citations:

> " 'It is well settled that a person out on bail is not so restrained of his liberty as to be entitled to a writ of habeas corpus. As actual or physical restraint is required in order that such a writ may issue.' Baker vs. Grice 169 U. S. 284; Slattings vs Splain 253 U. S. 39" *Brief of Respondent in Opposition to Petition for Writ of Certiorari,* page 11.

With the cited matter of the Court, petitioner is in agreement; but, *the petitioner herein does not and is not endeavoring to have this Court issue a writ of habeas corpus.* As to the conclusion of the respondent, unsupported by citation of authority, that this Court will not issue a writ of certiorari to review a habeas corpus action, *when the petitioner is at large upon recognizance,* petitioner cannot begin to agree. The respondent has obviously misconstrued the nature of a writ of certiorari; it has nothing whatever to do with the custody of the prisoner, its office and nature is to review the correctness of the decision of an inferior tribunal; that is,

> "* * * to * * * review * * * all questions of jurisdiction, power, and authority of the inferior tribunal to do the action complained of, and all questions of irregularity in the proceedings, that is, of the question whether the inferior tribunal has kept within the boundaries prescribed by the express terms of the statute law or well settled principles of the common law." 10 *Am. Jur.,* Certiorari, § 3, p. 524 [and cases cited therein].

Respondent has neither argued nor cited any authority to agree with the action of the Supreme Court of the State of Florida, which is complained of in the petition for writ of certiorari herein, that tends to overcome, qualify or negative, those authorities cited by the petitioner to show that the said Supreme Court, the State Court of last re-

sort, made serious error directly contrary to the law as announced by this Court. Nor, has the respondent in his said brief in opposition, cited any authority to the contrary of the showing made by the petitioner that this Court not only has jurisdiction to issue the prayed writ of certiorari, but that this Court has in the past issued such writ in instance that are almost indistinguishably alike to the cause at bar.

To make one slight reiteration, petitioner has clearly showed to this Court that the Supreme Court of the State of Florida has held,

> that were, upon a petition for discharge upon habeas corpus, petitioner was convicted upon a *general verdict* of guilty of violating a certain ordinance, and he attacks the validity of the ordinance, as being repugnant to the Constitution of the United States, if *any part is valid* he will be remanded to custody, and the detention will be upheld.

However, *this Court* has held absolutely contrary thereto,

> that where one is convicted upon a general verdict of guilty of violating an ordinance, and thereafter attacks the validity thereof upon grounds that the same is repugnant to the Constitution, he is to be *discharged* if *any part of the same is invalid,* for it can not be known that he was not convicted upon the invalid part. (See: *Terminiello* v. *Chicago* (1948), 337 U. S. 1, 93 L. Ed. 1131, 69 S. Ct. 894, rehearing denied 337 U. S. 934, 93 L. Ed. 1740, 69 S. Ct. 1490; *Stromberg* v. *California,* 283 U. S. 359, 75 L. Ed. 1117, 51 S. Ct. 532, 73 ALR 1484).

To the foregoing, respondent answered nothing; for logically *they cannot be reconciled.* This is but one of the several grievous errors found in the decision of the State Court of last resort which is hereby, by petition for writ of certiorari, sought to be reviewed.

Conclusion

For conclusion in this, petitioner's reply brief, petitioner would direct this Honorable Court's attention to the fact that the respondent, in his brief in opposition to the petition for writ of certiorari, has cited *no authority* that tends to uphold those actions which were taken by the Supreme Court of the State of Florida, and which, supported by adequately cited authority, are complained of in the petition for writ of certiorari filed in this cause. Respondent's said brief does not *restate* the questions presented by the petitioner, but rather presents new and different "questions" of his own which are neither relevant nor germane to the questions presented in the petition. Obviously, respondent's brief is calculated to do nothing more than mislead and confuse this Court and, therefore, ought be accorded no consideration whatever.

Petitioner has unequivocally demonstrated to this Court precisely such a situation which this Court has announced, in *Supreme Court of the United States Revised Rules*, Rule 38, Section 5(a) thereof, to be the character of reason for which this Court will grant certiorari, that is,

> "Where a state court has decided a federal of substance not theretofore determined by this court, or *has decided it in a way probably not in accord with applicable decisions of this court.*" (Emphasis ours.)

The magnitude of the cause at bar is patently obvious, for not only will the petitioner be caused to suffer incarceration but also he will in the future, so long as the ordinance herein questioned remains in force and effect, be deprived of a legitimate use of his property as will other owners of "house trailers" in and about Lakeland, Florida.

WHEREFORE, the petitioner, William E. Cooper, prays that this Honorable Court will enter its order causing its Writ of Certiorari, sought in this the above styled cause, to issue.

Respectfully submitted,

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